MASSACHUSETTS APPEALS COURT

Docket No. 2020-P-1396
COMMONWEALTH OF MASSACHUSETTS,
Appellee

v.

LEON DUFRESNE,
Defendant - Appellant

BRIEF FOR THE DEFENDANT ON APPEAL FROM THE LOWELL DISTRICT COURT

MIDDLESEX COUNTY

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B. Whether M.G.L. 209A is facially unconstitutional and unconstitutional as applied to the defendant because the statute violates art. 30 of the Declaration of Rights and whether the legislature can grant judicial power to the executive branch.

C. Whether despite that the trial judge properly sustained defense counsel's objection to the introduction of prior bad acts of the defendant, and instructed jurors to disregard the evidence, there was nonetheless significant undue prejudice to the defendant that influenced the jury.

D. Whether the defendant was prohibited from eliciting evidence from the Commonwealth's witness that showed bias and motive, violating his right to present a complete defense under the Sixth and Fourteen Amendments of the U.S. Constitution and Art. 12 of the Massachusetts Declaration of Rights.

Statement of the Case

The Complaint charged the defendant with violating a restraining order on September 25, 2017 (R.5).[1] On March 12, 2018, the defendant filed a motion to dismiss, which was subsequently denied on March 19, 2018 (Coffey, J., presiding)(R.1-4,8-35). On April 5, 2018, the defendant filed a timely notice of appeal from the denial of his motion to dismiss (R.36). He thereafter appealed the order to the single justice who denied it without a hearing deeming it could be "remedied under the ordinary review process" (Gants, J., presiding).[2]

On July 30, 2018, a one day jury trial was held in the Lowell District Court sitting in Middlesex County resulting in a guilty finding (Coffey, J., presiding)(R.1-4). As a result, he was sentenced to probation for a period of 18 months; he was also ordered to abide by any restraining order in effect, and to enter

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[1] The trial transcript is in one volume and will be referred to hereafter as "(Tr.)." The record appendix is produced post and will hereafter be referred to as "(R.)." The defendant's brief will hereafter be referred to as "(Def.Br.)."

[2] *See* Commonwealth v. David Pavlas, Rene Sumali, Leon Dufresne & Saly Reach, SJ-2018-0156

and complete the Certified Batterer's Program (R.1-4; Tr.147,151).

Statement of Facts

Doreen Savage-Previge (hereafter "Savage"), the defendant's former girlfriend of four to five years, obtained a restraining order against him on August 24, 2017, which was extended for one year on September 6, 2017 (Tr.52,54,58-61,66). The order required that he stay 100 yards from the large rooming house located at 95 Westford Street, Apartment 2, Lowell, which individually housed Savage and him (Tr.52,56).

Savage was uncertain whether she was home at 3:45 p.m. on September 25, 2017, the date of the alleged violation (Tr.61-62). Because she had sustained various blows to the head during her lifetime, Savage had memory issues and suffered seizures thus necessitating her to require medical assistance on a daily basis (Tr.70).

When the defendant vacated his residence, he left all of his furniture and personal property belongings behind (Tr.67). Savage subsequently removed those items from his room and, at the time of trial, they were still in her possession (Tr.67-68).

Jay Levy, the defendant's former neighbor and friend of 30 years, lived on the second floor of the

rooming house in the same section of Savage (Tr.54,65,68,75,86-87). Sometime after Savage obtained a restraining order, the defendant appeared on foot and approached Levy, who was standing in front of the rooming house (Tr.77-79,81). The two shook hands, and the defendant struck up a conversation (Tr.87). They talked for under two minutes during which time the defendant asked if he could go inside and buy cigarettes from Levy, but Levy refused because he knew Savage had a restraining order against him (Tr.79,84). They also talked briefly about Savage and Levy said, "I don't know if you are supposed to be here" (Tr.82-83,87). After Levy declined the defendant's offer to buy cigarettes, the defendant walked down the sidewalk in the opposite direction and went on his way (Tr.83,87-88,91). At no point did the defendant tell Levy to keep his presence in the area a secret nor did he attempt to hide himself (Tr.89-90). Later that afternoon, Levy told Savage of the defendant's presence outside the rooming house (Tr.84-85). The next day she called the police (Tr.63).

I. Summary of Argument

Because the defendant was not afforded an attorney when the restraining order issued, he cannot be punished criminally (Def.Br.11-24). The issuance of a restraining

order by a judge is civil in nature and thus any consequence for violating it must be civil rather than criminal (Def.Br.11-24). As police do not have authority to enforce civil judicial orders, doing so violates the Separation of Powers Clause (Def.Br.25-30).

Although the judge appropriately sustained the defendant's objection to Savage's improper response on direct examination, it was impossible for jurors to ignore and thus ultimately prejudiced the defendant (Def.Br.30-33). Additionally, the trial judge's refusal to allow defense counsel to inquire about Savage's motive to lie constituted prejudicial error and deprived him of his Constitutional right to present a defense (Def.Br.30-33). The effect of these errors, either individually or cumulatively warrant a reversal (Def.Br.30-33).

II. Argument

A. Criminal punishment of a civil order requires that a defendant be represented by counsel when the order issues; abuse prevention orders are unconstitutional and unconstitutional as applied under the United States Constitution, the Massachusetts Constitution, and the Declaration of Rights.

i. The defendant's conviction must be vacated because the imposition of criminal penalties for the violation of a civil order is unconstitutional unless the defendant was

The defendant is not collaterally attacking the validity of the abuse prevention order against him, nor is he arguing that criminal conduct that violates such order cannot be independently prosecuted. Instead, he argues that when an abuse prevention order is put into place, and at such time a defendant is not represented by counsel but thereafter is subjected to criminal penalties for violating such order, it is an infringement upon his rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, and the cognate provisions of the Massachusetts Declaration of Rights, as well as statutory guarantees. He also argues that because by its nature, a restraining order is civil, the violation of it in the absence of any independent criminal conduct, constitutes a violation of a civil order, thus criminal punishment is improper.

ii. Right to counsel under the United States Constitution for criminal and civil matters.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence." The United States Supreme Court construed this to ensure that "counsel must be provided for defendants

unable to employ counsel unless the right is competently and intelligently waived." Gideon v. Wainwright, 372 U.S. 335, 340 (1963). The Court, finding that the right to counsel applied to the states through the Fourteenth Amendment, noted the following:

"From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him." Id.

Although Gideon was limited to a right to counsel in criminal proceedings, the United States Supreme Court has nonetheless considered whether that right also exists in civil proceedings, ultimately finding that the official title of a proceeding alone does not govern the right to counsel. For instance, in In re Gault, 387 U.S. 1 (1967), which guaranteed a right to counsel in juvenile proceedings, the Court mandated a review of the substance of the proceedings. It refused to "disregard substance because of the feeble enticement of the 'civil' 'label of convenience' which has been attached to juvenile proceedings.'" Id. at 49-50. Likewise, in Vitek v. Jones, 445 U.S. 480, 496-497 (1980), a majority of the justices determined that prisoners had due process guarantees for involuntary mental health

treatment, concluding that there is a right to counsel in such cases notwithstanding the "civil" nature of the proceedings.

Under the federal constitution, the right to counsel is tied not to whether a case is considered to be criminal or civil but instead to whether there is a deprivation of liberty. Lassiter v. Department of Social Services, 452 U.S. 18, 26 (1981)(child custody). Lassiter established the framework for determining a federal right to counsel in civil matters. The Court looked to Mathews v. Eldridge, 424 U.S. 319 (1976) for guidance, which evaluated due process by considering "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions." Lassiter v. Department of Social Services, *supra* at 27. The Court must "balance these elements against each other, and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom." Id.

The Supreme Court found that because each case is different, "the decision whether due process calls for the appointment of counsel for indigent parents in

termination proceedings [is] to be answered in the first instance by the trial court, subject, of course, to appellate review." Id. at 31-32; *see also* Turner v. Rogers, 564 U.S. 431 (2011)(case by case determination of right to counsel in civil contempt proceedings); *see also* Gagnon v. Scarpelli, 411 U.S. 778 (1973)(case by case determination in revocation proceedings).

iii. Right to counsel under the Massachusetts Constitution and Declaration of Rights for criminal and civil matters.

Massachusetts independently guarantees the right to counsel under art. 12 of the Declaration of Rights. This right extends beyond Gideon to protect a number of civil proceedings. An individual who faces parental rights termination is entitled to counsel across a variety of circumstances. *See* Guardianship of V.V., 470 Mass. 590,594 (2015)(indigent parent's rights in guardianship proceedings); Adoption of Meaghan, 461 Mass. 1006,1007 (2012)(adoption proceedings); Department of Public Welfare v. J.K.B., 379 Mass. 1, 3-4 (1979)(terminating parental rights). An individual facing civil confinement is similarly entitled to representation. *See, e.g.*, Commonwealth v. Dresser, 71 Mass. App. Ct. 454,458 (2008)(right to counsel for sexually dangerous persons); Commonwealth v. Faulkner, 418 Mass. 352 (1994)(right to

counsel for probation violations). Likewise, an individual facing civil commitment for drug/alcohol dependency or for mental illness is entitled to counsel. G.L. c. 123 §35 ("The person shall have the right to be represented by legal counsel and may present independent expert or other testimony"); G.L. c.123 §12 ("Said committee for public counsel services shall forthwith appoint an attorney who shall meet with the person").

An individual is also entitled to representation in administrative cases. "Sex offenders have a constitutionally protected liberty and privacy interest in avoiding registration and public dissemination of registration information." Doe, No.972 v. Sex Offender Registry Board, 428 Mass. 90, 100 (1998), *citing* Doe v. Attorney General, 426 Mass. 136, 143 (1997) overruled in unrelated part by Doe, No. 380316 v. Sex Offender Registry Board, 473 Mass. 297, 300 (2015)(changing burden of proof). After the Supreme Judicial Court found the first proposed registration act unconstitutional, the legislature rewrote the act. The SJC found the statute could be construed constitutionally with an evidentiary hearing bearing appropriate due process

guarantees including representation. Doe, No. 972 v. Sex Offender Registry Board, *supra* at 91.[3]

iv. Abuse prevention orders under G.L. c. 209A

G.L. c. 209A states, in relevant part, that "[a] person suffering from abuse from an adult or minor family or household member may file a complaint in the court requesting protection from such abuse..." The measures by which a court may take to ensure the safety of the plaintiff are specifically proscribed on the Abuse Prevention Order (R.33-34). Paragraphs one through five concern abuse and contact (R.33-34). Termination of parental rights are governed by paragraphs six, seven, and eight (R.33-34). Paragraph twelve terminates Second Amendment rights, requiring the forced sale of lawfully-held firearms where applicable (R.33-34). Paragraph fourteen allows for additional orders, including the statutory authority to remove animals from the defendant's custody (R.33-34).

G.L. c. 209A also has elements of public dissemination and collateral criminal consequences. For

[3] The original statute did not contain a right to counsel. The second statute contained a right to counsel at the Superior Court level but not at the administrative level. Before the Court had an opportunity to review the constitutional rights to counsel, the legislature added a statutory right to counsel. Id.

example, under §3D, abuse prevention orders require dissemination of information to the criminal justice information services. Absent proof of a fraudulent filing, even a temporary abuse prevention order issued without the defendant's presence can *never* be removed from a defendant's criminal record. Vaccaro v. Vaccaro, 425 Mass. 153 (1997)(prohibited expungement of vacated orders); *see also* Commonwealth v. Boe, 456 Mass. 337 (2010)(fraud). Abuse prevention orders include multiple collateral consequences, including an increased likelihood of pretrial detention regardless of the merits of the prior orders (R.32).

Victim Witness Advocates assist victims of domestic abuse in filing abuse prevention orders; *see generally* G.L. c. 209A §3A ("complainant shall be given information prepared by the appropriate district attorney's office that other criminal proceedings may be available and such complainant shall be instructed by such district attorney's office relative to the procedures required to initiate criminal proceedings..."). Although the Victim Witness Advocates do not represent plaintiffs, they are a part of the prosecution team and do prepare Plaintiffs for hearings and attend those hearings. See Commonwealth v. Bing Sial

Liang, 434 Mass. 131, 135-136 (2001)(victim-witness advocates are part of the prosecution team and are employees of the prosecution).

The clerk's office will not provide any information about abuse prevention order hearings unless a defendant appears in person. If an order is mailed to the wrong address, there is no way for a defendant to learn about the order short of appearing in the (correct) courthouse.

Finally, where an order proceeds after an evidentiary hearing, practical difficulties arise if a defendant has also been criminally charged for acts related to the factual basis of the abuse prevention order. A defendant faces the prospect of asserting a Fifth Amendment privilege or waiving the privilege to testify; all without the assistance of counsel. *But see* Frizado v. Frizado, 420 Mass. 592, 586 (1995)(no violation of the Declaration of Rights solely because it does not force a defendant to abandon his Fifth Amendment rights).

v. Imposition of criminal sanctions against an indigent defendant who was not represented by counsel when an abuse prevention order issued is facially unconstitutional and unconstitutional as applied to the defendant, under the United States Constitution, the

Massachusetts Constriction, and the Declaration of Rights.

This Court need not decide whether counsel must be appointed to all indigent defendants in abuse prevention order matters. Instead, this Court need only consider the remedy for a violation of a civil order when an indigent defendant is not represented by counsel when the order issues. In doing so, this Court must first examine whether a right to counsel is required to ensure due process in abuse prevention order cases. It must then consider whether, in the absence of counsel, it is constitutional to punish an individual criminally for a violation of that civil order.

The Lassiter analysis for appointment of counsel begins with examining "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions" before turning to the presumption that counsel is not a right unless a defendant "[m]ay lose his personal freedom." Lassiter v. Department of Social services, *supra* at 27. The defendant's interest here is manifold: the Second Amendment is implicated by the forced sale of lawfully-held firearms; the Privileges and Immunities clause is implicated by implementing exclusionary zones; and the

Fifth Amendment is implicated by termination of parental rights, by seizure of animals, and by public dissemination. These rights also violate the cognate provisions of the Declaration of Rights. Indeed, the effect of the abuse prevention order is to criminalize behavior that is lawful but for the order.

Although the government has an interest in preventing future criminal behavior, the Commonwealth's "civil labels and good intentions do not obviate the need for criminal due process safeguards." In re Winship, 397 U.S. 358,365-366 (1970)(discussing juvenile proceedings). The interest here is no greater than any criminal statute that deters and punishes behavior. The defendant accepts that domestic abuse is a serious societal problem, but the behavior is punishable by criminal penalties for specific crimes, such as assault, threatening to commit a crime, and witness intimidation. Moreover, the government's interests is also protected by the district attorney's office participation in abuse prevention order proceedings; *see* G.L. c. 209A §3A. As such, despite that the Commonwealth is technically not a party to the action, by statute, they are very much an active participant.

The risk that these practices will lead to erroneous decisions is particularly great because a defendant's attendance is encumbered by the clerk's office refusal to provide basic information to defendants and because a defendant's evidentiary submission is hampered by criminal consequences of testifying. Finally, the loss of personal freedom is explicit. The order contains express language that a violation is a criminal offense; a defendant can also be independently imprisoned for failing to turn over firearms. G.L. c. 209A §3C, 3D, 7. Under these circumstances, the federal constitution likely guarantees counsel for abuse prevention order cases. Lassiter v. Department of Social Services, *supra* at 27.

Massachusetts analysis is much easier, if for no reason other than the possibility of permanent termination of parental rights because in Massachusetts, a parent has the right to counsel if parental rights might be terminated. *See* Guardianship of V.V., 470 Mass. at 594; Adoption of Meaghan, 461 Mass. at 1007; Department of Public Welfare v. J.K.B., 379 Mass. at 3-4. Not only can custody awards be granted, but the court can also prohibit any contact between parent and child whatsoever.

Moreover, the other abridgements and criminal consequences at stake in abuse prevention order proceedings, similar to those for sex offender registration, also necessitates procedural due process safeguards. Doe v. Attorney General, 426 Mass. at 144 ("(1) the requirement that he register with local police; (2) the disclosure of accumulated personal information on request; (3) the possible harm to his earning capacity; (4) the harm to his reputation; and most important, (5) the statutory branding of him as a public danger, a sex offender"). In light of the same, it is readily apparent that the Declaration of Rights guarantees counsel for abuse prevention order cases.[4]

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[4]While some states have considered and rejected a right to counsel in abuse prevention order matters, i.e., D.N. v. K.M, 16 N.J. 587, 83 A.3d 825 (N.J.2014)(no statutory authority to authorize appointment of counsel for the parties in a domestic violence action), others have accepted the concept. *See e.g.* Matter of Collier v. Norman, 69 A.D. 3rd 936 (N.Y.App.Div.2010) *quoting* Matter of Brown v. Wood, 38 A.D. 3d 769, 770 (2007)(deprivation of right to appointed counsel "requires reversal, without regard to the merits of the unrepresented party's position"); N.Y. Fam. Ct. Act §262(a)(the petitioner and respondent in a domestic violence proceeding have "the right to have counsel assigned by the court in any case where he or she is financially unable to obtain the same"). Others have found there is a right to court appointed counsel for juveniles in civil protection order hearings because they "may lead to criminal sanctions." In re: D.L., 189 Ohio App. 3d 154 (Ohio Ct. App. 6th Dist)(2010).

What then is the consequence of failing to provide the defendant counsel at an abuse prevention order hearing? A legal determination that requires counsel, but is made without counsel and without informing a defendant of his right to appointed counsel, cannot be used to establish guilt in a criminal trial and cannot be used to impose criminal penalties. Commonwealth v. Barrett, 3 Mass. App. Ct. 8 (1975), *citing* Loper v. Beto, 405 U.S. 473,481-483 (1972), United States v. Tucker, 404 U.S. 443 (1972), and Burgett v. Texas, 389 U.S. 109,115 (1967). This is a dispositive resolution in the defendant's case and one required by the United States Constitution, the Massachusetts Constitution and the Declaration of Rights.

In short, should a court wish to later impose criminal penalties for an abuse prevention order violation, a defendant must be afforded counsel. Conversely, should a court wish to impose only civil sanctions for an abuse prevention order violation, no counsel need be appointed. Here, the appropriate remedy for a violation of this civil order, by this indigent defendant who was not represented by counsel when the order issued, can only be civil in nature.

B. M.G.L. 209A is facially unconstitutional and unconstitutional as applied to the defendant because the statute violates art. 30 of the Declaration of Rights; the legislature cannot grant judicial power to the executive branch.

Article 30 of the Declaration of Rights states: "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men." M.G.L. 209A is unconstitutional because the legislature cannot grant judicial power to the executive branch, nor can the executive branch enforce a civil judicial order.

The judiciary enforces judicial orders. "It is an essential element of a court that it possess power to enforce its orders and to protect itself from having its authority flouted." Walton Lunch Co. v. Kearney, 236 Mass. 310,315 (1920); *see also* Jake J. v. Commonwealth, 433 Mass 70,77 (2000)("The court has inherent authority to exercise its own legitimate powers.")' Commonwealth v. Silva, 10 Mass.App.Ct. 784,791 (1980)("it is essential that the District Court have the power to enforce any of its orders"). "Although inherent powers

may be recognized by statute, they exist independently, because they 'directly affect[] the capacity of the judicial department to function' and cannot be nullified by the Legislature without violating art. 30 [of the Massachusetts Declaration of Rights]." Querubin v. Commonwealth, 440 Mass. 108,114(2003)(brackets in original), *quoting* First Justice of the Bristol Division of the Juvenile Court Department v. Clerk Magistrate of the Bristol Division of the Juvenile Court Department, 438 Mass. 387,397(2003); *see also* Commonwealth v. Fremont Inv. & Loan, 459 Mass. 209,213 (2011). Similarly, to the "extent that a judge's order is 'a legitimate exercise of [this] inherent power of the District Courts [or BMC], the lack of statutory authorization for that [order] is immaterial.'" Commonwealth v. Teixeira, 475 Mass. 482,490 (2016)(brackets in original), *quoting* Brach v. Chief Justice of the District Court Department, 386 Mass. 528,535 (1982).

One would be hard pressed to provide another example where a police officer is empowered with the authority to arrest a person for violating a judicial order. For instance, when a judge in a divorce action orders one party to transfer title to a motor vehicle to

the other, a failure to comply with such orders results in a hearing whereby the judge can then find the non-complying party in contempt. Because the offender violated not a criminal statute but a *civil court order*, police cannot arrest him, as they are empowered only to enforce *criminal laws*, not civil judicial orders. Likewise, in criminal cases, police cannot simply arrest prosecutors or defense attorneys for their failure to comply with judicial orders that involve outstanding discovery, as to do so would be to impede upon the powers of the judicial branch. In such a scenario, the result of non-compliance can include, but not be limited to, a monetary fine, a dismissal of the case, or the prohibition of presenting certain evidence at trial.

Should it be necessary for law enforcement to bring a non-complier before the judge who issued the order, and that individual refuses to appear voluntarily, the proper mechanism is for a bench warrant to issue, which then gives police authority to arrest. The same holds true for probationers who have been ordered by a judge to undergo drug and alcohol screening in that a failure to comply with the same does not enable police to arrest the probationer on the spot for non-compliance. On the

contrary, the appropriate means to enforce the order is always left solely to the judge.

To eliminate this step entirely grants the executive branch authority to enforce judicial orders, stripping that authority from the judiciary by rendering the judiciary obsolete. Querubin v. Commonwealth, 440 Mass at 114 (court's power "cannot be nullified by the Legislature"). Even the mere threat of criminal prosecution in a civil order violates art. 30 because it grants the executive branch authority to enforce abuse prevention order violations more severely than the judiciary can enforce its own orders. Furtado v. Furtado, 380 Mass. 137,141 (1980)(initial violations usually sanctioned with non-punitive contempt). The legislature cannot circumvent these protocols, granting to the executive branch, the power to enforce judicial orders under the guise of labeling such power the enforcement of a "criminal" statute by the executive branch. *See, e.g.*, In re Winship, 397 U.S. 358, 365-366 (1970)(labels and good intentions immaterial). Otherwise, under the auspices of criminal statutes, the legislature could authorize the executive branch the authority to hear abuse prevention order applications in the first instance and to enforce violations with

criminal sanctions. Art 30 of the Declaration of Rights ("executive shall never…exercise judicial powers").

The Commonwealth and this Court are not without remedy. A defendant who violates an abuse prevention order by committing a criminal offense is independently subject to criminal punishment for the offense. The solution for violating a civil order is to impose civil punishments by subjecting a violator to civil contempt. G.L. c. 209A §7 ("Criminal remedies provided herein are not exclusive and do not preclude any other available civil or criminal remedies…[C]ourt departments may each enforce by civil contempt procedure a violation of its own court order."). That contempt, however, must non-punitive in nature, as it is "intended to achieve compliance with the court's orders for the benefit of the complainant." Furtado v. Furtado, *supra* at 141.[5]

M.G.L. c. 209A is facially unconstitutional and unconstitutional as applied under art. 30 of the Declaration of Rights. The legislature cannot grant

[5] It can, however, still include jail. In the event of an egregious civil contempt, a judge can punish a non-complier with incarceration but only after that person has appeared before the judge and a finding of contempt is adjudicated. *See, e.g.*, G.L. c. 215 §34B (review of contempt order prior to order of confinement); Mass.R.Cr.P. 43 (summary contempts).

judicial power to the executive branch and the executive branch cannot exercise judicial power. The defendant therefore moves this Court to assert its judicial power to vacate the defendant's conviction.

C. Despite that the trial judge properly sustained defense counsel's objection to the introduction of prior bad acts of the defendant, and instructed jurors to disregard the evidence, there was nonetheless significant undue prejudice to the defendant that influenced the jury.

Prior to trial, the defendant filed a motion to exclude any evidence of "bad character, prior misconduct, subsequent misconduct, or alcohol abuse," which was allowed by the court (R.6-7). Savage was later asked on direct examination when she and the defendant broke up, and she responded, "The night that he assaulted me the last time" (Tr.55). This was immediately objected to by defense counsel, and the trial judge sustained the objection, simply telling jurors to "disregard the witness's answer" (Tr.55). Although the objection was sustained, and the answer was properly stricken by the judge, the prejudice to the defendant was significant against the backdrop of these particular facts and thus impossible for jurors to ignore.

It was clear during the direct examination of Savage that she suffered from significant memory

problems that were apparently a result of head trauma. Savage's head trauma was repeatedly at the forefront of the case, as she testified that she had "problems with her brain," "brain damage," disabilities," and "memory problems" that necessitated daily medical care (Tr.54-55,59,61,63,66,70,72). Savage explained that her "brain damage" had been caused by "blows to her head" (Tr.70). There was no objection to such testimony, nor did Savage specifically articulate that these "blows" were not caused by the defendant. Likewise, there was no instruction by the judge, or requested by defense counsel, telling jurors that they were not to hypothesize about how Savage suffered the blows. As such, jurors were free to speculate that it was at the hands of the defendant that she suffered brain damage. This was particularly damaging because Savage testified, "the night he assaulted me *the last time*," thus alerting jurors to the fact that the defendant had physically assaulted her multiple times during their four or five year relationship. Jurors could then surmise that it was either during a single or a series of physical blows upon Savage by the defendant that led to her brain injury.

Even if jurors did not hypothesize that Savage's "brain damage" was directly caused by the defendant, at the very least, they knew that the defendant physically assaulted an individual with significant disabilities. This is far more prejudicial than evidence of an assault and battery upon an able-bodied person.[6] Since jurors became privy to the fact that the defendant physically assaulted a disabled person, and the court obviously credited the allegation because it lead to the issuance of a restraining order to ensure Savage's safety, the undue prejudice to the defendant is clear. Considering the stricken testimony, coupled with the other admissible evidence, the bias to the defendant is palpable.

Although the Commonwealth will likely argue that the curative instruction given to jurors corrected any error, "[t]he fact of the matter is that, too often, such admonition against misuse is intrinsically ineffective, in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile

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[6] Massachusetts considers assault and battery on a disabled person a felony whereas an assault and battery on an able-bodied person is a misdemeanor. *See G.L. c. 265 §13A & §13K.*

collection of words, and fails of its purpose as a legal protection to the defendants against whom such a declaration should not tell." Delli Paoli v. United States, 352 U.S. 232,247 (1957)(Frankfurter, Black, Douglas, and Brennan, dissenting).

When judges are called upon to "unring the bell," the reviewing court has a "duty to be skeptical as to the effectiveness of limiting instructions." Commonwealth v. Redmond, 370 Mass. 591, 597 (1976); Commonwealth v. Killelea, 370 Mass. 638, 648 (9); Commonwealth v. West, 44 Mass. App. Ct. 150 (1998)(judgment reversed due to improper closing argument by prosecutor despite limiting instructions). "The government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider, but which they cannot put out of their minds." Id. at 248. Indeed, "[the naïve assumption that prejudicial effects can be overcome by instruction to the jury" is clearly an unmitigated fiction." Krulewitch v. United States, 336 U.S. 440, 453 (1949)(Jackson, J., concurring. Commonwealth v. Dascalakis, 246 Mass. 12, 29 (1923)("The things thus seen by the jurors could not well be banished from their minds.").

D. **The defendant was prohibited from eliciting evidence from the Commonwealth's witness that showed bias and motive, violating his right to present a complete defense under the Sixth and Fourteen Amendments of the U.S. Constitution and Art. 12 of the Massachusetts Declaration of Rights.**

In order to establish bias and motive, the defense attempted to elicit from Savage that after the defendant was forced to vacate his residence, Savage kept all of his personal property (Tr.66-71). The prosecutor objected, and the trial judge inexplicably sustained the objection as follows:

Q Now, after you got this order he subsequently left his apartment; is that right?

A Yes, sir.

Q And when he left the apartment, there was property left, furniture, his personal belongings; is that right?

A Yes.

Q And you went in and you retrieved some of that property; is that correct?

PROSECUTOR: Objection.

THE COURT: Sustained.

THE WITNESS: Can I take the Fifth on that?

THE COURT: What's that?

THE WITNESS: Can I on take the Fifth on that?

THE COURT: No, no, ma'am.

THE WITNESS: Oh, I'm sorry.

Q When you went into court -- you went into court on this case more than once; is that correct?

A Yes, sir.

Q And you agreed to give him an opportunity to pick up his property from your residence; is that right?

A Yes. I had taken everything out of his room and put it in the closet in which he was renting. It's still there.

Q So you still have his belongings with you; is that right?

A Yes, sir. But he didn't -

PROSECUTOR: Objection.

THE COURT: Sustained.

Q You agreed to allow him to come pick up your property?

PROSECUTOR: Objection.

THE COURT: Sustained.

Q Now, you are aware that Mr. Dufresne and Mr. Levy knew each other for quite some time?

A Yes.

Q And you were all friends? You spent time together?

A Yes, sir.

DEFENSE COUNSEL: May we approach, briefly, your Honor.(Sidebar as follows:

DEFENSE COUNSEL: Your Honor, I don't, necessarily -- (inaudible) I have for making matters (inaudible) sustained, the issues of the restraining order was modified August 6th when he came to pick up his property. It's on the face of the restraining order.[7]

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[7]The restraining order was modified on September 9, 2017 to allow for the defendant to retrieve his personal

THE COURT: Right.

DEFENSE COUNSEL: There are several instances of that.

THE COURT: But let me ask you this, because there's no mention that they can do it without the police being present.

DEFENSE COUNSEL: No, I understand that, your Honor.

THE COURT: So it doesn't really get to where I think you want to get to.

DEFENSE COUNSEL: Well, that's correct. (Inaudible) just trying to indicate that she was aware (inaudible) that she continued to have his personal property.

THE COURT: Right. I allowed one of those questions. She was -- unless I -- I did allow it, right?

DEFENSE COUNSEL: Yes.

THE COURT: Okay.

DEFENSE COUNSEL: But just to (inaudible) I'm not going to further inquire, but --

THE COURT: Oh, okay.

DEFENSE COUNSEL: -- if I have further continuing objections at this point in time.

THE COURT: Oh, okay.

DEFENSE COUNSEL: Thank you, your Honor. (Tr.66-71).

The judge prohibited inquiry about whether Savage seized the defendant's personal property, and continued to retain possession, presumably because the restraining

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property (R.37-39). Defense counsel misstated the date as August 6, 2017.

order indicated police would need to be present with the defendant for him to retrieve his belongings. This was error and deprived the defendant of a right to present a complete defense under the Sixth and Fourteenth Amendments and Art. 12 of the Massachusetts Declaration of Rights. Commonwealth v. Dagenais, 437 Mass. 832,839 (2002); Rock v. Arkansas, 483 US 44, 55-53 (1987); Crane v. Kentucky, 476 U.S. 683, 690-691 (1986)(whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense).

The restraining order was clearly modified on September 6, 2017 to allow the defendant to retrieve all of his belongings in the company of the police "at a time agreed to by the Plaintiff" (R.37-39). Savage did not live with the defendant, yet somehow managed to acquire and retain his personal belongings. Whether the defendant subsequently made any efforts thereafter to retrieve his property, and what happened as a result of those efforts, was fair game for cross-examination, particularly where the order was contingent upon her "agreeing" to a specified time for him to appear.

Certainly, had the defendant failed to make any attempt to retrieve his personal property with police, Savage could testify to as much. Likewise, had the defendant made efforts to retrieve his property but his efforts were rebuffed, ignored, or met with resistance, it was certainly relevant to establish motive and bias to fabricate a restraining order violation because Savage would be able to thwart any future efforts made by him if he was incarcerated. *See* Commonwealth v. Jewett, 392 Mass. 558 (1984)(error warranting reversal where trial judge in rape case excluded evidence that a charge against the defendant involving a second rape victim had been dismissed by the prosecution); Commonwealth v. Wray, 88 Mass. App. Ct. 403 (2015)(judgment reversed where trial judge barred defense counsel from eliciting prior inconsistent statements from Commonwealth's witness).

A defendant's right to present his theory of defense is an important right designed to vindicate the principle that "[t]he ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." Taylor v. Illinois, 484 U.S. 400, 409 (1988), *quoting* United States v. Nixon, 418 U.S. 683, 709 (1974). Indeed, the

right of an accused to present his version of the facts "is necessary to ensure that the defendant is not deprived of a fair trial." Chambers v. Mississippi, 410 U.S. 284, 302-303 (1973). *See* Washington v. Texas, 388 U.S. 14, 19 (1967). Here, the defendant was prevented from presenting his version of the facts.

The defendant has "well-established due process rights...protected by the Constitutions of the United States and of the Commonwealth, *see* Pennsylvania v. Ritchie, 480 U.S. 39, 56-58 (1987); Commonwealth v. Stockhammer, 409 Mass. 867, 883-884 (1991), to present evidence `shown to be relevant and likely to be significant' or material to his defense, and to use that evidence to confront witnesses and to challenge the validity of the Commonwealth's case." Commonwealth v. Fuller, 423 Mass. 216, 233 (1996). By excluding this evidence, the defendant was deprived of such rights. *See* Commonwealth v. Fayerweather, 406 Mass. 78 (1989)(judge erroneously excluded evidence that the alleged victim had hallucinations about the defendant weeks prior to the alleged rape where knowledge of this fact could have had a significant impact on the trial's outcome).

"An error is nonprejudicial only '[i]f ... the conviction is sure that the error did not influence the

jury, or had but very slight effect....' "Commonwealth v. Flebotte, 417 Mass. 348, 353, (1994) *quoting* Commonwealth v. Peruzzi, *15 Mass.App.Ct. 437*, 445, (1983). "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error." Id. at 445-446, *quoting* Kotteakos v. United States, 328 U.S. 750, 764-765 (1946). Rather, it is "whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." Id. at 446, *quoting* Kotteakos, *supra* at 765.

Even if the court deems that none of the errors made at trial taken in isolation would warrant a reversal, considering them cumulatively, a reversal is warranted. United States v. Sepulveda, 15 F.3d 1161, 1195-1196 (1st Cir. 1993), and United States v. Fernandez, 145 F.3d 59, 66 (1st Cir. 1998). Commonwealth v. Santiago, 425 Mass. 491 (1997)(combination of errors may compel reversal, even if each taken separately would not be deemed sufficiently prejudicial to require that result). Here, the errors that occurred at trial did

influence the jury in a case where the evidence was far from overwhelming.[8]

III. Conclusion

WHEREFORE the defendant respectfully requests that his Honorable Court vacate the judgment against him and enter judgment in his favor or, in the alternative, award him a new trial.

Respectfully submitted,
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[8] The evidence presented by the Commonwealth was hardly overwhelming, which is demonstrated by the fact that jurors twice returned deadlocked necessitating a Tuey-Rodriguez instruction (Tr.132-135). *See* Commonwealth v. Tuey, 8 Cush. 1,2-3 (1851). Commonwealth v. Rodriguez, 364 Mass. 87, 101-103 (1973).

Addendum

G.L. 209A §3: Remedies; period of relief

Section 3. A person suffering from abuse from an adult or minor family or household member may file a complaint in the court requesting protection from such abuse, including, but not limited to, the following orders:

(a) ordering the defendant to refrain from abusing the plaintiff, whether the defendant is an adult or minor;

(b) ordering the defendant to refrain from contacting the plaintiff, unless authorized by the court, whether the defendant is an adult or minor;

(c) ordering the defendant to vacate forthwith and remain away from the household, multiple family dwelling, and workplace. Notwithstanding the provisions of section thirty-four B of chapter two hundred and eight, an order to vacate shall be for a fixed period of time, not to exceed one year, at the expiration of which time the court may extend any such order upon motion of the plaintiff, with notice to the defendant, for such additional time as it deems necessary to protect the plaintiff from abuse;

(d) awarding the plaintiff temporary custody of a minor child; provided, however, that in any case brought in the probate and family court a finding by such court by a preponderance of the evidence that a pattern or serious incident of abuse, as defined in section 31A of chapter 208, toward a parent or child has occurred shall create a rebuttable presumption that it is not in the best interests of the child to be placed in sole custody, shared legal custody or shared physical custody with the abusive parent. Such presumption may be rebutted by a preponderance of the evidence that such custody award is in the best interests of the child. For the purposes of this section, an ''abusive parent'' shall mean a parent who has committed a pattern of abuse or a serious incident of abuse;

For the purposes of this section, the issuance of an order or orders under chapter 209A shall not in and of itself constitute a pattern or serious incident of abuse; nor shall an order or orders entered ex parte under said chapter 209A be admissible to show whether a pattern or serious incident of abuse has in fact occurred; provided, however, that an order or orders entered ex parte under said chapter 209A may be admissible for other purposes as the court may determine, other than showing whether a pattern or serious incident of abuse has in fact occurred; provided further, that the underlying facts upon which an order or orders under said chapter 209A was based may also form the basis for a

finding by the probate and family court that a pattern or serious incident of abuse has occurred.

If the court finds that a pattern or serious incident of abuse has occurred and issues a temporary or permanent custody order, the court shall within 90 days enter written findings of fact as to the effects of the abuse on the child, which findings demonstrate that such order is in the furtherance of the child's best interests and provides for the safety and well-being of the child.

If ordering visitation to the abusive parent, the court shall provide for the safety and well-being of the child and the safety of the abused parent. The court may consider:

(a) ordering an exchange of the child to occur in a protected setting or in the presence of an appropriate third party;

(b) ordering visitation supervised by an appropriate third party, visitation center or agency;

(c) ordering the abusive parent to attend and complete, to the satisfaction of the court, a certified batterer's treatment program as a condition of visitation;

(d) ordering the abusive parent to abstain from possession or consumption of alcohol or controlled substances during the visitation and for 24 hours preceding visitation;

(e) ordering the abusive parent to pay the costs of supervised visitation;

(f) prohibiting overnight visitation;

(g) requiring a bond from the abusive parent for the return and safety of the child;

(h) ordering an investigation or appointment of a guardian ad litem or attorney for the child; and

(i) imposing any other condition that is deemed necessary to provide for the safety and well-being of the child and the safety of the abused parent.

Nothing in this section shall be construed to affect the right of the parties to a hearing under the rules of domestic relations procedure or to affect the discretion of the probate and family court in the conduct of such hearing.

(e) ordering the defendant to pay temporary support for the plaintiff or any child in the plaintiff's custody or both, when the defendant has a legal obligation to support such a person. In determining the amount to be paid, the court shall apply the standards established in the child support guidelines. Each

judgment or order of support which is issued, reviewed or modified pursuant to this chapter shall conform to and shall be enforced in accordance with the provisions of section 12 of chapter 119A;

(f) ordering the defendant to pay the person abused monetary compensation for the losses suffered as a direct result of such abuse. Compensatory losses shall include, but not be limited to, loss of earnings or support, costs for restoring utilities, out-of-pocket losses for injuries sustained, replacement costs for locks or personal property removed or destroyed, medical and moving expenses and reasonable attorney's fees;

(g) ordering information in the case record to be impounded in accordance with court rule;

(h) ordering the defendant to refrain from abusing or contacting the plaintiff's child, or child in plaintiff's care or custody, unless authorized by the court;

(i) the judge may recommend to the defendant that the defendant attend a batterer's intervention program that is certified by the department of public health.

No filing fee shall be charged for the filing of the complaint. Neither the plaintiff nor the plaintiff's attorney shall be charged for certified copies of any orders entered by the court, or any copies of the file reasonably required for future court action or as a result of the loss or destruction of plaintiff's copies.

Any relief granted by the court shall be for a fixed period of time not to exceed one year. Every order shall on its face state the time and date the order is to expire and shall include the date and time that the matter will again be heard. If the plaintiff appears at the court at the date and time the order is to expire, the court shall determine whether or not to extend the order for any additional time reasonably necessary to protect the plaintiff or to enter a permanent order. When the expiration date stated on the order is on a weekend day or holiday, or a date when the court is closed to business, the order shall not expire until the next date that the court is open to business. The plaintiff may appear on such next court business day at the time designated by the order to request that the order be extended. The court may also extend the order upon motion of the plaintiff, for such additional time as it deems necessary to protect from abuse the plaintiff or any child in the plaintiff's care or custody. The fact that abuse has not occurred during the pendency of an order shall not, in itself, constitute sufficient ground for denying or failing to extend the order, of allowing an order to expire or be vacated, or for refusing to issue a new order.

The court may modify its order at any subsequent time upon motion by either party. When the plaintiff's address is inaccessible to the defendant as provided in section 8 of this chapter and the defendant has filed a motion to modify the court's order, the court shall be responsible for notifying the plaintiff. In no event shall the court disclose any such inaccessible address.

No order under this chapter shall in any manner affect title to real property.

No court shall compel parties to mediate any aspect of their case. Although the court may refer the case to the family service office of the probation department or victim/witness advocates for information gathering purposes, the court shall not compel the parties to meet together in such information gathering sessions.

A court shall not deny any complaint filed under this chapter solely because it was not filed within a particular time period after the last alleged incident of abuse.

A court may issue a mutual restraining order or mutual no-contact order pursuant to any abuse prevention action only if the court has made specific written findings of fact. The court shall then provide a detailed order, sufficiently specific to apprise any law officer as to which party has violated the order, if the parties are in or appear to be in violation of the order.

Any action commenced under the provisions of this chapter shall not preclude any other civil or criminal remedies. A party filing a complaint under this chapter shall be required to disclose any prior or pending actions involving the parties for divorce, annulment, paternity, custody or support, guardianship, separate support or legal separation, or abuse prevention.

If there is a prior or pending custody support order from the probate and family court department of the trial court, an order issued in the superior, district or Boston municipal court departments of the trial court pursuant to this chapter may include any relief available pursuant to this chapter including orders for custody or support; provided, however, that upon issuing an order for custody or support, the superior, district or Boston municipal court shall provide a copy of the order to the probate and family court department of the trial court that issued the prior or pending custody or support order immediately; provided further, that such order for custody or support shall be for a fixed period of time, not to exceed 30 days; and provided further, that such order may be superseded by a subsequent custody or support order issued by the probate and family court department, which shall retain final jurisdiction over any custody or support order. This section shall not be interpreted to mean that superior, district

or Boston municipal court judges are prohibited or discouraged from ordering all other necessary relief or issuing the custody and support provisions of orders pursuant to this chapter for the full duration permitted under subsection (c).

If the parties to a proceeding under this chapter are parties in a subsequent proceeding in the probate and family court department for divorce, annulment, paternity, custody or support, guardianship or separate support, any custody or support order or judgment issued in the subsequent proceeding shall supersede any prior custody or support order under this chapter.

G.L. c. 209A §3C: Continuation or modification of order for surrender or suspension

Section 3C. Upon the continuation or modification of an order issued pursuant to section 4 or upon petition for review as described in section 3B, the court shall also order or continue to order the immediate suspension and surrender of a defendant's license to carry firearms, including a Class A or Class B license, and firearms identification card and the surrender of all firearms, rifles, shotguns, machine guns or ammunition which such defendant then controls, owns or possesses if the court makes a determination that the return of such license to carry firearms, including a Class A or Class B license, and firearm identification card or firearms, rifles, shotguns, machine guns or ammunition presents a likelihood of abuse to the plaintiff. A suspension and surrender order issued pursuant to this section shall continue so long as the restraining order to which it relates is in effect; and, any law enforcement official to whom such weapon is surrendered may store, transfer or otherwise dispose of any such weapon in accordance with the provisions of section 129D of chapter 140; provided, however, that nothing herein shall authorize the transfer of any weapons surrendered by the defendant to anyone other than a licensed dealer. Any violation of such order shall be punishable by a fine of not more than $5,000 or by imprisonment for not more than two and one-half years in a house of correction or by both such fine and imprisonment.

G. L. c. 209A §3D: Transmission of report containing defendant's name and identifying information and statement describing defendant's alleged conduct and relationship to plaintiff to department of criminal justice information services upon order for suspension or surrender

Section 3D. Upon an order for suspension or surrender issued pursuant to sections 3B or 3C, the court shall transmit a report containing the defendant's name and identifying information and a statement describing the defendant's alleged conduct and relationship to the plaintiff to the department of criminal justice information services. Upon the expiration, cancellation or revocation of the order, the court shall transmit a report containing the defendant's name and identifying information, a statement describing the defendant's alleged conduct and relationship to the plaintiff and an explanation that the order is no longer current or valid to the department of criminal justice information services who shall transmit the report, pursuant to paragraph (h) of section 167A of chapter 6, to the attorney general of the United States to be included in the National Instant Criminal Background Check System.

G. L. c. 209A §7: Abuse prevention orders; domestic violence record search; service of order; enforcement; violations

Section 7. When considering a complaint filed under this chapter, a judge shall cause a search to be made of the records contained within the statewide domestic violence record keeping system maintained by the office of the commissioner of probation and shall review the resulting data to determine whether the named defendant has a civil or criminal record involving domestic or other violence. Upon receipt of information that an outstanding warrant exists against the named defendant, a judge shall order that the appropriate law enforcement officials be notified and shall order that any information regarding the defendant's most recent whereabouts shall be forwarded to such officials. In all instances where an outstanding warrant exists, a judge shall make a finding, based upon all of the circumstances, as to whether an imminent threat of bodily injury exists to the petitioner. In all instances where such an imminent threat of bodily injury is found to exist, the judge shall notify the appropriate law enforcement officials of such finding and such officials shall take all necessary actions to execute any such outstanding warrant as soon as is practicable.

Whenever the court orders under sections eighteen, thirty-four B, and thirty-four C of chapter two hundred and eight, section thirty-

two of chapter two hundred and nine, sections three, four and five of this chapter, or sections fifteen and twenty of chapter two hundred and nine C, the defendant to vacate, refrain from abusing the plaintiff or to have no contact with the plaintiff or the plaintiff's minor child, the register or clerk-magistrate shall transmit two certified copies of each such order and one copy of the complaint and summons forthwith to the appropriate law enforcement agency which, unless otherwise ordered by the court, shall serve one copy of each order upon the defendant, together with a copy of the complaint, order and summons and notice of any suspension or surrender ordered pursuant to section three B of this chapter. Law enforcement agencies shall establish adequate procedures to ensure that, when effecting service upon a defendant pursuant to this paragraph, a law enforcement officer shall, to the extent practicable: (i) fully inform the defendant of the contents of the order and the available penalties for any violation of an order or terms thereof and (ii) provide the defendant with informational resources, including, but not limited to, a list of certified batterer intervention programs, substance abuse counseling, alcohol abuse counseling and financial counseling programs located within or near the court's jurisdiction. The law enforcement agency shall promptly make its return of service to the court.

Law enforcement officers shall use every reasonable means to enforce such abuse prevention orders. Law enforcement agencies shall establish procedures adequate to insure that an officer on the scene of an alleged violation of such order may be informed of the existence and terms of such order. The court shall notify the appropriate law enforcement agency in writing whenever any such order is vacated and shall direct the agency to destroy all record of such vacated order and such agency shall comply with that directive.

Each abuse prevention order issued shall contain the following statement: VIOLATION OF THIS ORDER IS A CRIMINAL OFFENSE.

Any violation of such order or a protection order issued by another jurisdiction shall be punishable by a fine of not more than five thousand dollars, or by imprisonment for not more than two and one-half years in a house of correction, or by both such fine and imprisonment. In addition to, but not in lieu of, the forgoing penalties and any other sentence, fee or assessment, including the victim witness assessment in section 8 of chapter 258B, the court shall order persons convicted of a crime under this statute to pay a fine of $25 that shall be transmitted to the treasurer for deposit into the General Fund. For any violation of such order, or as a condition of a continuance without a finding, the court shall order the defendant to complete a certified batterer's

intervention program unless, upon good cause shown, the court issues specific written findings describing the reasons that batterer's intervention should not be ordered or unless the batterer's intervention program determines that the defendant is not suitable for intervention. The court shall not order substance abuse or anger management treatment or any other form of treatment as a substitute for certified batterer's intervention. If a defendant ordered to undergo treatment has received a suspended sentence, the original sentence shall be reimposed if the defendant fails to participate in said program as required by the terms of his probation. If the court determines that the violation was in retaliation for the defendant being reported by the plaintiff to the department of revenue for failure to pay child support payments or for the establishment of paternity, the defendant shall be punished by a fine of not less than one thousand dollars and not more than ten thousand dollars and by imprisonment for not less than sixty days; provided, however, that the sentence shall not be suspended, nor shall any such person be eligible for probation, parole, or furlough or receive any deduction from his sentence for good conduct until he shall have served sixty days of such sentence.

When a defendant has been ordered to participate in a treatment program pursuant to this section, the defendant shall be required to regularly attend a certified or provisionally certified batterer's treatment program. To the extent permitted by professional requirements of confidentiality, said program shall communicate with local battered women's programs for the purpose of protecting the victim's safety. Additionally, it shall specify the defendant's attendance requirements and keep the probation department informed of whether the defendant is in compliance.

In addition to, but not in lieu of, such orders for treatment, if the defendant has a substance abuse problem, the court may order appropriate treatment for such problem. All ordered treatment shall last until the end of the probationary period or until the treatment program decides to discharge the defendant, whichever comes first. When the defendant is not in compliance with the terms of probation, the court shall hold a revocation of probation hearing. To the extent possible, the defendant shall be responsible for paying all costs for court ordered treatment.

Where a defendant has been found in violation of an abuse prevention order under this chapter or a protection order issued by another jurisdiction, the court may, in addition to the penalties provided for in this section after conviction, as an alternative to incarceration and, as a condition of probation, prohibit contact with the victim through the establishment of court defined geographic exclusion zones including, but not limited to,

the areas in and around the complainant's residence, place of employment, and the complainant's child's school, and order that the defendant to wear a global positioning satellite tracking device designed to transmit and record the defendant's location data. If the defendant enters a court defined exclusion zone, the defendant's location data shall be immediately transmitted to the complainant, and to the police, through an appropriate means including, but not limited to, the telephone, an electronic beeper or a paging device. The global positioning satellite device and its tracking shall be administered by the department of probation. If a court finds that the defendant has entered a geographic exclusion zone, it shall revoke his probation and the defendant shall be fined, imprisoned or both as provided in this section. Based on the defendant's ability to pay, the court may also order him to pay the monthly costs or portion thereof for monitoring through the global positioning satellite tracking system.

In each instance where there is a violation of an abuse prevention order or a protection order issued by another jurisdiction, the court may order the defendant to pay the plaintiff for all damages including, but not limited to, cost for shelter or emergency housing, loss of earnings or support, out-of-pocket losses for injuries sustained or property damaged, medical expenses, moving expenses, cost for obtaining an unlisted telephone number, and reasonable attorney's fees.

Any such violation may be enforced in the superior, the district or Boston municipal court departments. Criminal remedies provided herein are not exclusive and do not preclude any other available civil or criminal remedies. The superior, probate and family, district and Boston municipal court departments may each enforce by civil contempt procedure a violation of its own court order.

The provisions of section eight of chapter one hundred and thirty-six shall not apply to any order, complaint or summons issued pursuant to this section.

G. L. c. 123 §35: Commitment of alcoholics or substance abusers

Section 35. For the purposes of this section the following terms shall, unless the context clearly requires otherwise, have the following meanings:

''Alcohol use disorder'', the chronic or habitual consumption of alcoholic beverages by a person to the extent that (1) such use substantially injures the person's health or substantially interferes with the person's social or economic functioning, or (2) the person has lost the power of self-control over the use of such beverages.

''Facility'', a public or private facility that provides care and treatment for a person with an alcohol or substance use disorder.

''Substance use disorder'', the chronic or habitual consumption or ingestion of controlled substances or intentional inhalation of toxic vapors by a person to the extent that: (i) such use substantially injures the person's health or substantially interferes with the person's social or economic functioning; or (ii) the person has lost the power of self-control over the use of such controlled substances or toxic vapors.

Any police officer, physician, spouse, blood relative, guardian or court official may petition in writing any district court or any division of the juvenile court department for an order of commitment of a person whom he has reason to believe has an alcohol or substance use disorder. Upon receipt of a petition for an order of commitment of a person and any sworn statements the court may request from the petitioner, the court shall immediately schedule a hearing on the petition and shall cause a summons and a copy of the application to be served upon the person in the manner provided by section twenty-five of chapter two hundred and seventy-six. In the event of the person's failure to appear at the time summoned, the court may issue a warrant for the person's arrest. Upon presentation of such a petition, if there are reasonable grounds to believe that such person will not appear and that any further delay in the proceedings would present an immediate danger to the physical well-being of the respondent, said court may issue a warrant for the apprehension and appearance of such person before it. If such person is not immediately presented before a judge of the district court, the warrant shall continue day after day for up to 5 consecutive days, excluding Saturdays, Sundays and legal holidays, or until such time as the person is presented to the court, whichever is sooner; provided, however that an arrest on such warrant shall not be made unless the person may be presented immediately before a judge of the district court. The person shall have the right to be represented by legal counsel and may present independent expert or other testimony. If the court finds the person indigent, it shall immediately appoint counsel. The court shall order examination by a qualified physician, a qualified psychologist or a qualified social worker.

If, after a hearing which shall include expert testimony and may include other evidence, the court finds that such person is an individual with an alcohol or substance use disorder and there is a likelihood of serious harm as a result of the person's alcohol or substance use disorder, the court may order such person to be committed for a period not to exceed 90 days to a facility designated by the department of public health, followed by the availability of case management services provided by the

department of public health for up to 1 year; provided, that a review of the necessity of the commitment shall take place by the superintendent on days 30, 45, 60 and 75 as long as the commitment continues. A person so committed may be released prior to the expiration of the period of commitment upon written determination by the superintendent of the facility that release of that person will not result in a likelihood of serious harm; provided, that the superintendent shall provide timely notification to the committing court and, if consent is obtained from the committed person, to the petitioner; provided further, that the superintendent shall request such consent from all committed persons. Such commitment shall be for the purpose of inpatient care for the treatment of an alcohol or substance use disorder in a facility licensed or approved by the department of public health or the department of mental health. Subsequent to the issuance of a commitment order, the superintendent of a facility may authorize the transfer of a patient to a different facility for continuing treatment; provided, that the superintendent shall provide timely notification of the transfer to the committing court and, if consent is obtained from the committed person, to the petitioner; provided further, that the superintendent shall request such consent from all committed persons.

If the department of public health informs the court that there are no suitable facilities available for treatment licensed or approved by the department of public health or the department of mental health, or if the court makes a specific finding that the only appropriate setting for treatment for the person is a secure facility, then the person may be committed to: (i) a secure facility for women approved by the department of public health or the department of mental health, if a female; or (ii) the Massachusetts correctional institution at Bridgewater or other such facility as designated by the commissioner of correction, if a male; provided, however, that any person so committed shall be housed and treated separately from persons currently serving a criminal sentence. The person shall, upon release, be encouraged to consent to further treatment and shall be allowed voluntarily to remain in the facility for such purpose. The department of public health shall maintain a roster of public and private facilities available, together with the number of beds currently available and the level of security at each facility, for the care and treatment of alcohol use disorder and substance use disorder and shall make the roster available to the trial court.

Annually, not later than February 1, the commissioner shall report on whether a facility other than the Massachusetts correctional institution at Bridgewater is being used for treatment of males under the previous paragraph and the number of persons so committed

to such a facility in the previous year. The report shall be provided to the clerks of the senate and house of representatives, the chairs of the joint committee on public safety and homeland security and the chairs of the joint committee on the judiciary.

Nothing in this section shall preclude a facility, including the Massachusetts correctional institution at Bridgewater or such other facility as may be designated by the commissioner of correction, from treating persons on a voluntary basis.

The court, in its order, shall specify whether such commitment is based upon a finding that the person is a person with an alcohol use disorder, substance use disorder, or both. The court, upon ordering the commitment of a person found to be a person with an alcohol use disorder or substance use disorder pursuant to this section, shall transmit the person's name and nonclinical identifying information, including the person's social security number and date of birth, to the department of criminal justice information services. The court shall notify the person that such person is prohibited from being issued a firearm identification card pursuant to section 129B of chapter 140 or a license to carry pursuant to sections 131 and 131F of said chapter 140 unless a petition for relief pursuant to this section is subsequently granted.

After 5 years from the date of commitment, a person found to be a person with an alcohol use disorder or substance use disorder and committed pursuant to this section may file a petition for relief with the court that ordered the commitment requesting that the court restore the person's ability to possess a firearm, rifle or shotgun. The court may grant the relief sought in accordance with the principles of due process if the circumstances regarding the person's disqualifying condition and the person's record and reputation are determined to be such that: (i) the person is not likely to act in a manner that is dangerous to public safety; and (ii) the granting of relief would not be contrary to the public interest. In making the determination, the court may consider evidence from a licensed physician or clinical psychologist that the person is no longer suffering from the disease or condition that caused the disability or that the disease or condition has been successfully treated for a period of 3 consecutive years.

A facility used for commitment under this section for a person found to be a person with a substance use disorder shall maintain or provide for the capacity to possess, dispense and administer all drugs approved by the federal Food and Drug Administration for use in opioid agonist treatment, including partial agonist treatment, and opioid antagonist treatment for opioid use disorder

and shall make such treatment available to any person for whom such treatment is medically appropriate.

If the court grants a petition for relief pursuant to this section, the clerk shall provide notice immediately by forwarding a certified copy of the order for relief to the department of criminal justice information services, who shall transmit the order, pursuant to paragraph (h) of section 167A of chapter 6, to the attorney general of the United States to be included in the National Instant Criminal Background Check System.

A person whose petition for relief is denied may appeal to the appellate division of the district court for a de novo review of the denial.

G. L. c. 123 §12: Emergency restraint and hospitalization of persons posing risk of serious harm by reason of mental illness

Section 12. (a) Any physician who is licensed pursuant to section 2 of chapter 112 or qualified psychiatric nurse mental health clinical specialist authorized to practice as such under regulations promulgated pursuant to the provisions of section 80B of said chapter 112 or a qualified psychologist licensed pursuant to sections 118 to 129, inclusive, of said chapter 112, or a licensed independent clinical social worker licensed pursuant to sections 130 to 137, inclusive, of chapter 112 who, after examining a person, has reason to believe that failure to hospitalize such person would create a likelihood of serious harm by reason of mental illness may restrain or authorize the restraint of such person and apply for the hospitalization of such person for a 3-day period at a public facility or at a private facility authorized for such purposes by the department. If an examination is not possible because of the emergency nature of the case and because of the refusal of the person to consent to such examination, the physician, qualified psychologist, qualified psychiatric nurse mental health clinical specialist or licensed independent clinical social worker on the basis of the facts and circumstances may determine that hospitalization is necessary and may apply therefore. In an emergency situation, if a physician, qualified psychologist, qualified psychiatric nurse mental health clinical specialist or licensed independent clinical social worker is not available, a police officer, who believes that failure to hospitalize a person would create a likelihood of serious harm by reason of mental illness may restrain such person and apply for the hospitalization of such person for a 3-day period at a public facility or a private facility authorized for such purpose by the department. An application for hospitalization shall state the reasons for the restraint of such person and any other relevant

information which may assist the admitting physician or physicians. Whenever practicable, prior to transporting such person, the applicant shall telephone or otherwise communicate with a facility to describe the circumstances and known clinical history and to determine whether the facility is the proper facility to receive such person and also to give notice of any restraint to be used and to determine whether such restraint is necessary.

(b) Only if the application for hospitalization under the provisions of this section is made by a physician specifically designated to have the authority to admit to a facility in accordance with the regulations of the department, shall such person be admitted to the facility immediately after his reception. If the application is made by someone other than a designated physician, such person shall be given a psychiatric examination by a designated physician immediately after his reception at such facility. If the physician determines that failure to hospitalize such person would create a likelihood of serious harm by reason of mental illness he may admit such person to the facility for care and treatment.

Upon admission of a person under the provisions of this subsection, the facility shall inform the person that it shall, upon such person's request, notify the committee for public counsel services of the name and location of the person admitted. Said committee for public counsel services shall forthwith appoint an attorney who shall meet with the person. If the appointed attorney determines that the person voluntarily and knowingly waives the right to be represented, or is presently represented or will be represented by another attorney, the appointed attorney shall so notify said committee for public counsel services, which shall withdraw the appointment.

Any person admitted under the provisions of this subsection, who has reason to believe that such admission is the result of an abuse or misuse of the provisions of this subsection, may request, or request through counsel an emergency hearing in the district court in whose jurisdiction the facility is located, and unless a delay is requested by the person or through counsel, the district court shall hold such hearing on the day the request is filed with the court or not later than the next business day.

(c) No person shall be admitted to a facility under the provisions of this section unless he, or his parent or legal guardian in his behalf, is given an opportunity to apply for voluntary admission under the provisions of paragraph (a) of section ten and unless he, or such parent or legal guardian has been informed (1) that he has a right to such voluntary admission, and (2) that the period

of hospitalization under the provisions of this section cannot exceed three days. At any time during such period of hospitalization, the superintendent may discharge such person if he determines that such person is not in need of care and treatment.

(d) A person shall be discharged at the end of the three day period unless the superintendent applies for a commitment under the provisions of sections seven and eight of this chapter or the person remains on a voluntary status.

(e) Any person may make application to a district court justice or a justice of the juvenile court department for a three day commitment to a facility of a mentally ill person whom the failure to confine would cause a likelihood of serious harm. The court shall appoint counsel to represent said person. After hearing such evidence as he may consider sufficient, a district court justice or a justice of the juvenile court department may issue a warrant for the apprehension and appearance before him of the alleged mentally ill person, if in his judgment the condition or conduct of such person makes such action necessary or proper. Following apprehension, the court shall have the person examined by a physician designated to have the authority to admit to a facility or examined by a qualified psychologist in accordance with the regulations of the department. If said physician or qualified psychologist reports that the failure to hospitalize the person would create a likelihood of serious harm by reason of mental illness, the court may order the person committed to a facility for a period not to exceed three days, but the superintendent may discharge him at any time within the three day period. The periods of time prescribed or allowed under the provisions of this section shall be computed pursuant to Rule 6 of the Massachusetts Rules of Civil Procedure.

G.L. c. 215 §34B: Review of contempt order prior to order of confinement

Section 34B. A judge of the probate court who has found a party to be in civil or criminal contempt for failure to obey any order or judgment of the probate court relative to support of a spouse or children or relative to the custody of children shall, before ordering such person to be confined in a jail, review such order or judgment to determine that such order or judgment was issued by a court of competent jurisdiction and was not obtained by fraud.

G.L. c. 265 §13A: Assault or assault and battery; punishment

Section 13A. (a) Whoever commits an assault or an assault and battery upon another shall be punished by imprisonment for not more than 21/2 years in a house of correction or by a fine of not more than $1,000.

A summons may be issued instead of a warrant for the arrest of any person upon a complaint for a violation of any provision of this subsection if in the judgment of the court or justice receiving the complaint there is reason to believe that he will appear upon a summons.

(b) Whoever commits an assault or an assault and battery:

(i) upon another and by such assault and battery causes serious bodily injury;

(ii) upon another who is pregnant at the time of such assault and battery, knowing or having reason to know that the person is pregnant; or

(iii) upon another who he knows has an outstanding temporary or permanent vacate, restraining or no contact order or judgment issued pursuant to section 18, section 34B or 34C of chapter 208, section 32 of chapter 209, section 3, 4 or 5 of chapter 209A, or section 15 or 20 of chapter 209C, in effect against him at the time of such assault or assault and battery; shall be punished by imprisonment in the state prison for not more than 5 years or in the house of correction for not more than 21/2 years, or by a fine of not more than $5,000, or by both such fine and imprisonment.

(c) For the purposes of this section, ''serious bodily injury'' shall mean bodily injury that results in a permanent disfigurement, loss or impairment of a bodily function, limb or organ, or a substantial risk of death.

G.L. c. 265 §13K: Assault and battery upon an elderly or disabled person; definitions; penalties

Section 13K. (a) For the purpose of this section the following words shall, unless the context requires otherwise, have the following meanings:—

''Abuse'', physical contact which either harms or creates a substantial likelihood of harm.

''Bodily injury'', substantial impairment of the physical condition, including, but not limited to, any burn, fracture of any bone, subdural hematoma, injury to any internal organ, or any

injury which occurs as the result of repeated harm to any bodily function or organ, including human skin.

''Caretaker'', a person with responsibility for the care of an elder or person with a disability, which responsibility may arise as the result of a family relationship, or by a fiduciary duty imposed by law, or by a voluntary or contractual duty undertaken on behalf of such elder or person with a disability. A person may be found to be a caretaker under this section only if a reasonable person would believe that such person's failure to fulfill such responsibility would adversely affect the physical health of such elder or person with a disability. Minor children and adults adjudicated incompetent by a court of law may not be deemed to be caretakers under this section.

(i) ''Responsibility arising from a family relationship'', it may be inferred that a husband, wife, son, daughter, brother, sister, or other relative of an elder or person with a disability is a caretaker if the person has provided primary and substantial assistance for the care of the elder or person with a disability as would lead a reasonable person to believe that failure to provide such care would adversely affect the physical health of the elder or person with a disability.

(ii) ''Responsibility arising from a fiduciary duty imposed by law'', it may be inferred that the following persons are caretakers of an elder or person with a disability to the extent that they are legally required to apply the assets of the estate of the elder or person with a disability to provide the necessities essential for the physical health of the elder or person with a disability: (i) a guardian of the person or assets of an elder or person with a disability; (ii) the conservator of an elder or person with a disability, appointed by the probate court pursuant to chapter two hundred and one; and (iii) an attorney-in-fact holding a power of attorney or durable power of attorney pursuant to chapter two hundred and one B.

(iii) ''Responsibility arising from a contractual duty'', it may be inferred that a person who receives monetary or personal benefit or gain as a result of a bargained-for agreement to be responsible for providing primary and substantial assistance for the care of an elder or person with a disability is a caretaker.

(iv) ''Responsibility arising out of the voluntary assumption of the duties of caretaker'', it may be inferred that a person who has voluntarily assumed responsibility for providing primary and substantial assistance for the care of an elder or person with a disability is a caretaker if the person's conduct would lead a reasonable person to believe that failure to provide such care

would adversely affect the physical health of the elder or person with a disability, and at least one of the following criteria is met: (i) the person is living in the household of the elder or person with a disability, or present in the household on a regular basis; or (ii) the person would have reason to believe, as a result of the actions, statements or behavior of the elder or person with a disability, that he is being relied upon for providing primary and substantial assistance for physical care.

''Elder'', a person sixty years of age or older.

''Mistreatment'', the use of medications or treatments, isolation, or physical or chemical restraints which harms or creates a substantial likelihood of harm.

''Neglect'', the failure to provide treatment or services necessary to maintain health and safety and which either harms or creates a substantial likelihood of harm.

''Person with disability'', a person with a permanent or long-term physical or mental impairment that prevents or restricts the individual's ability to provide for his or her own care or protection.

''Serious bodily injury'', bodily injury which results in a permanent disfigurement, protracted loss or impairment of a bodily function, limb or organ, or substantial risk of death.

(a1/2) Whoever commits an assault and battery upon an elder or person with a disability shall be punished by imprisonment in the state prison for not more than 3 years or by imprisonment in a house of correction for not more than 21/2 years, or by a fine of not more than $1,000, or both such fine and imprisonment.

(b) Whoever commits an assault and battery upon an elder or person with a disability and by such assault and battery causes bodily injury shall be punished by imprisonment in the state prison for not more than five years or in the house of correction for not more than two and one-half years or by a fine of not more than one thousand dollars or by both such fine and imprisonment.

(c) Whoever commits an assault and battery upon an elder or person with a disability and by such assault and battery causes serious bodily injury shall be punished by imprisonment in the state prison for not more than ten years or in the house of correction for not more than two and one-half years or by a fine of not more than five thousand dollars or by both such fine and imprisonment.

(d) Whoever, being a caretaker of an elder or person with a disability, wantonly or recklessly permits bodily injury to such elder or person with a disability, or wantonly or recklessly

permits another to commit an assault and battery upon such elder or person with a disability which assault and battery causes bodily injury, shall be punished by imprisonment in the state prison for not more than five years or in the house of correction for not more than two and one-half years or by a fine of not more than five thousand dollars or by both such fine and imprisonment.

(d1/2) Whoever, being a caretaker of an elder or person with a disability, wantonly or recklessly commits or permits another to commit abuse, neglect or mistreatment upon such elder or person with a disability, shall be punished by imprisonment in the state prison for not more than 3 years, or imprisonment in the house of correction for not more than 21/2 years, or by a fine of not more than $5,000, or by both such fine and imprisonment.

(e) Whoever, being a caretaker of an elder or person with a disability, wantonly or recklessly permits serious bodily injury to such elder or person with a disability, or wantonly or recklessly permits another to commit an assault and battery upon such elder or person with a disability which assault and battery causes serious bodily injury, shall be punished by imprisonment in the state prison for not more than ten years or by imprisonment in the house of correction for not more than two and one-half years or by a fine of not more than ten thousand dollars or by both such fine and imprisonment.

(f) Conduct shall not be construed to be wanton or reckless conduct under this section if directed by a competent elder or person with a disability, or for the sole reason that, in lieu of medical treatment, an elder or person with a disability is being furnished or relies upon treatment by spiritual means through prayer if such treatment is in accordance with the tenets and practices of the established religious tradition of such elder or person with a disability, and is provided at the direction of such elder or person with a disability, who shall be competent, or pursuant to the direction of a person who is properly designated a health care proxy under chapter two hundred and one D.

Massachusetts Rules of Criminal Procedure 43

(a) When warranted

A criminal contempt may be punished summarily when

(1) summary punishment is necessary to maintain order in the courtroom;

(2) the contemptuous conduct occurred in the presence of, and was witnessed by, the presiding judge;

(3) the presiding judge enters a preliminary finding at the time of the contemptuous conduct that a criminal contempt occurred; and

(4) the punishment for each contempt does not exceed three months imprisonment and a fine of $2,000.

(b) Procedure

(1)

Upon making a preliminary finding that a criminal contempt occurred, the presiding judge shall give the alleged contemnor notice of the charges and shall hold a hearing to provide at least a summary opportunity for the alleged contemnor to produce evidence and argument relevant to guilt or punishment. For good cause shown, the presiding judge may continue the hearing to enable the contemnor to obtain counsel or evidence.

(2)

The presiding judge may order the alleged contemnor held, subject to bail and/or conditions of release, pending the hearing provided for in subsection (b)(1) if the judge finds it necessary to maintain order in the courtroom or to assure the alleged contemnor's appearance.

(3)

(i) If, after the hearing provided for in subsection (b)(1), the presiding judge determines that summary contempt is not appropriate because the appropriate punishment for the alleged contempt exceeds three months imprisonment and a fine of $2,000, the judge shall refer the alleged contemnor for prosecution under **Rule 44**. If necessary to maintain order in the courtroom or to assure the alleged contemnor's appearance, the judge may order the alleged contemnor held, subject to bail and/or conditions of release, for a reasonable period of time, not to exceed 15 days absent good cause shown, pending the issuance of a complaint or indictment under **Rule 44(a)** .

(ii) If, after the hearing, the presiding judge determines that summary contempt is not appropriate because one or more of the requirements in subsection (a)(1), (a)(2), or (a)(3)

is not satisfied, or for another reason, the judge shall discharge the alleged contemnor. The judge, in his or her discretion, may refer the matter to the government for investigation and possible prosecution, and nothing in this subsection shall preclude such investigation or prosecution, whether undertaken in response to the judge's referral or independently.

(iii) If, after the hearing, the presiding judge determines that summary contempt is appropriate, the judge shall make a finding on the record of summary contempt, setting forth the facts upon which that finding is based. The court shall further announce a judgment of summary contempt in open court, enter that judgment on the court's docket, and notify the contemnor of the right to appeal. The judge may defer sentencing, or the execution of any sentence, where the interests of orderly courtroom procedure and substantial justice require. If necessary to maintain order in the courtroom or to assure the contemnor's appearance, the judge may order the contemnor held, subject to bail and/or conditions of release, pending sentencing.

(c) Appeal

A contemnor may appeal a judgment of summary contempt to the Appeals Court.

New York Consolidated Laws, Family Court Act - FCT § 262. Assignment of counsel for indigent persons

(a) Each of the persons described below in this subdivision has the right to the assistance of counsel. When such person first appears in court, the judge shall advise such person before proceeding that he or she has the right to be represented by counsel of his or her own choosing, of the right to have an adjournment to confer with counsel, and of the right to have counsel assigned by the court in any case where he or she is financially unable to obtain the same:

(i) the respondent in any proceeding under article ten or ten-A of this act and the petitioner in any proceeding under part eight of article ten of this act;

(ii) the petitioner and the respondent in any proceeding under article eight of this act;

(iii) the respondent in any proceeding under part three of article six of this act;

(iv) the parent or person legally responsible, foster parent, or other person having physical or legal custody of the child in any proceeding under article ten or ten-A of this act or section three hundred fifty-eight-a , three hundred eighty-four or three hundred eighty-four-b of the social services law , and a non-custodial parent or grandparent served with notice pursuant to paragraph (e) of subdivision two of section three hundred eighty-four-a of the social services law ;

(v) the parent of any child seeking custody or contesting the substantial infringement of his or her right to custody of such child, in any proceeding before the court in which the court has jurisdiction to determine such custody;

(vi) any person in any proceeding before the court in which an order or other determination is being sought to hold such person in contempt of the court or in willful violation of a previous order of the court, except for a contempt which may be punished summarily under section seven hundred fifty-five of the judiciary law ;

(vii) the parent of a child in any adoption proceeding who opposes the adoption of such child.

(viii) the respondent in any proceeding under article five of this act in relation to the establishment of paternity.

(ix) in a proceeding under article ten-C of this act:

(1) a parent or caretaker as such terms are defined in section one thousand ninety-two of this act;

(2) an interested adult as such term is defined in section one thousand ninety-two of this act provided that:

(A) the child alleged to be destitute in the proceeding held pursuant to article ten-C of this act was removed from the care of such interested adult;

(B) the child alleged to be destitute in the proceeding held pursuant to article ten-C of this act resides with the interested adult; or

(C) the child alleged to be destitute in the proceeding held pursuant to article ten-C of this act resided with such interested adult immediately prior to the filing of the petition under article ten-C of this act;

(3) any interested adult as such term is defined in section one thousand ninety-two of this act or any person made a party to the article ten-C proceeding pursuant to subdivision (c) of section one thousand ninety-four of this act for whom the court orders counsel appointed pursuant to subdivision (d) of section one thousand ninety-four of this act.

(b) Assignment of counsel in other cases. In addition to the cases listed in subdivision (a) of this section, a judge may assign counsel to represent any adult in a proceeding under this act if he determines that such assignment of counsel is mandated by the constitution of the state of New York or of the United States, and includes such determination in the order assigning counsel;

(c) Implementation. Any order for the assignment of counsel issued under this part shall be implemented as provided in article eighteen-B of the county law.

CERTIFICATE OF COMPLIANCE

I, Jennifer H. O'Brien, hereby certify that the enclosed brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass.R.A.P. 16(a)(6); Mass.R.A.P. 16(e); Mass.R.A.P. 16(f); Mass.R.A.P. 16(h); Mass.R.A.P. 18; and Mass. R.A.P. 20. In compliance with Mass.R.A.P 20(2)(A), this brief is typed using monospaced font, Courier New of 12 point, and does not exceed 50 pages.

Date: 12/22/20

Jennifer H. O'Brien

CERTIFICATE OF SERVICE

I, Jennifer H. O'Brien, attorney for the Defendant, hereby certify under the pains and penalties of perjury that I have this date caused a true copy of the defendant's brief and record appendix to be served upon the parties listed below by email via efile as follows:

Middlesex County Assistant District Attorney's Office
Appeals Division
15 Commonwealth Avenue
Woburn, MA 01801

Dated: 12/22/20

Jennifer H. O'Brien